

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
(Indianapolis Division)**

**RED BARN MOTORS, INC.,  
PLATINUM MOTORS, INC., and  
MATTINGLY AUTO SALES, INC.,  
individually, and on behalf of other  
members of the general public  
similarly situated,**

**V.**

**COX ENTERPRISES, INC.,  
COX AUTOMOTIVE, INC.,  
NEXTGEAR CAPITAL, INC.,  
F/K/A DEALER SERVICES  
CORPORATION, successor by merger  
with Manheim Automotive Financial  
Services, Inc., and JOHN WICK,**

**DOCKET NO. 1:14-cv-01589-TWP-DML**

## CLASS ACTION

\*\*\*\*\*

**PLAINTIFFS' RESPONSE TO DEFENDANTS' RULE 72 OBJECTIONS  
TO MAGISTRATE JUDGE'S ORDERS ON MOTIONS TO STAY AND  
REQUEST TO STAY DISCOVERY REGARDING SUBSET OF CLASS**

**NOW INTO COURT** come Plaintiffs Red Barn Motors, Inc., Platinum Motors, Inc., and Mattingly Auto Sales, Inc. and respectfully submit this memorandum in response to Defendants’ Rule 72 objections to the Magistrate Judge’s recent Orders (Dkt. 240). Defendants have not met the heavy burden of showing that the Magistrate Judge’s Orders—Dkt. 238 and 239—were clearly erroneous and should be overturned pursuant to Rule 72. Those Orders should be affirmed by this Court, and class notice to all Class and Subclass members should move forward on schedule.

## I. Procedural Context

On July 12, Defendants filed the motion for reconsideration of class certification. Dkt. 228. On July 14, they moved to stay class discovery and class notice. Dkt. 230. On August 10, they filed another motion to modify the class based on the 2013 contracts, raising an issue that they

knew about at least as early as the class certification briefing in 2016. Dkt. 237. On August 11, the Magistrate Judge held that “[class] notice should not be delayed, but will stay discovery related to damages until further order.” Dkt. 239 at 2. Not satisfied, Defendants now ask this Court to review and overturn that Order “to relieve NextGear of any requirement to provide information” regarding dealers who signed the 2013 contracts. Dkt. 240 at 2.<sup>1</sup>

## **II. Standard of Review**

The district court’s review of the Magistrate Judge’s discovery decisions is governed by Rule 72(a). *Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926, 943 (7th Cir. 1997). The district judge is “to modify or set aside any part of the order that is clearly erroneous or is contrary to law.” *Id.* at 943. This standard “means that the district court can overturn the magistrate judge’s ruling only if the district court is left with the definite and firm conviction that a mistake has been made.” *Id.* This is “an extremely deferential standard and the district court may not reverse the magistrate judge’s decision simply because the district court judge would have come to a different conclusion.” *McGuire v. Carrier Corp.*, 1:09-CV-315-WTL-JMS, 2010 WL 231099, at \*1 (S.D. Ind. Jan. 13, 2010) (citing *Pinkston v. Madry*, 440 F.3d 879, 888 (7th Cir. 2006)).

## **III. Defendants Have Provided No Basis for Modifying the Class Discovery and Class Notice Order (Dkt. 239).**

To begin, Defendants ignore the fact that the trial of this matter is scheduled for December of this year and that trial has already been continued twice. Any further delay of discovery and/or class notice would endanger that trial date and greatly prejudice Plaintiffs. Further, Defendants’ suggestion that their motion to narrow the class creates new grounds for modification of the

---

<sup>1</sup> The Court’s Order requires that Defendants provide names and contact information for all Class and Subclass members within 21 days of the August 11 order (by this Friday, September 1, 2017). *See* Dkt. 239 at 5. These responses must include information regarding all class members, including those members who Defendants seek to exclude from the class.

Magistrate Judge's class discovery and notice Order (Dkt. 239) should be rejected. That motion was filed before entry of the August 11 Order and was specifically addressed therein:

If, indeed, the class definition is changed in any way because of the defendants' motion for reconsideration **(or defendants' recently filed motion to narrow class)** or because of any appeal, then the court can determine the timing of any additional notice because of such changes.

Dkt. 239 at 2 (emphasis in bold added). Defendants entirely fail to meet their heavy burden under Rule 72, citing only cases they have cited previously. Defendants' continued objections to class certification are not sufficient grounds for halting the class notice process or class discovery. *Id.* at 3. There is little to no burden on NextGear to producing information about the class members who signed the 2013 contracts; they already compiled that information for purposes of their motion to narrow the class. *See* Dkt. 237-1 and -3. Finally, the Magistrate Judge properly rejected the argument that notifying class members of class certification at this stage would harm Defendants' business and reputation; the notice can reflect Defendants' denial of the claims. *See* Dkt. 239 at 2-3. Defendants provide no basis for finding that the Magistrate Judge's Order is clearly erroneous.

#### **IV. Defendants Have Provided No Basis for Modifying the Order on Plaintiffs' Motion to Stay Summary Judgment Ruling (Dkt. 238).**

Defendants incorrectly suggest on page 2 that the Magistrate Judge's Order (Dkt. 238) "seems also to suggest that *Defendants'* pending Motion for Summary Judgment... is not ripe for decision until after the class notice process has been completed." The Order does not say anything about the timing of the Court's order on Defendants' summary judgment motion, nor did Plaintiffs in their motion to stay (Dkt. 214) ask the Court to stay a ruling on Defendants' motion.

#### **V. Conclusion**

For these reasons, Plaintiffs request that this Court deny Defendants' objections and affirm the Magistrate Judge's Orders so that class discovery and notice can proceed as set forth therein.

Respectfully submitted,

/s/ Kerry A. Murphy  
CATHERINE E. LASKY (La. Bar No. 28652)  
*Pro Hac Vice*  
KERRY A. MURPHY (La. Bar No. 31382)  
*Pro Hac Vice*  
**LASKY MURPHY LLC**  
715 Girod Street, Suite 250  
New Orleans, Louisiana 70130  
Telephone: (504) 603-1500  
Facsimile: (504) 603-1503  
[klasky@laskymurphy.com](mailto:klasky@laskymurphy.com)  
[kmurphy@laskymurphy.com](mailto:kmurphy@laskymurphy.com)

GLADSTONE N. JONES, III (La. Bar No. 22221) *Pro Hac Vice*  
LYNN E. SWANSON (La. Bar No. 22650) *Pro Hac Vice*  
**JONES, SWANSON, HUDDALL & GARRISON, L.L.C.**  
601 Poydras Street, Suite 2655  
New Orleans, Louisiana 70130  
Telephone: (504) 523-2500  
Facsimile: (504) 523-2508  
[gjones@jonesswanson.com](mailto:gjones@jonesswanson.com)  
[lswanson@jonesswanson.com](mailto:lswanson@jonesswanson.com)

CASSIE E. FELDER (La. Bar No. 27805) *Pro Hac Vice*  
**THE CASSIE FELDER LAW FIRM**  
7515 Jefferson Hwy., #313  
Baton Rouge, LA 70806  
Main: (504) 232-1733  
Cell: (504) 400-1127  
[cassie@cassiefelderlaw.com](mailto:cassie@cassiefelderlaw.com)

JAMES M. GARNER (La. Bar No. 19589) *Pro Hac Vice*  
RYAN D. ADAMS (La. Bar No. 27931) *Pro Hac Vice*  
MATTHEW M. COMAN (La. Bar No. 23613) *Pro Hac Vice*  
JACOB AIREY (La. Bar No. 27933) *Pro Hac Vice*  
**SHER GARNER CAHILL RICHTER KLEIN & HILBERT, L.L.C.**  
909 Poydras Street, Suite 2800  
New Orleans, Louisiana 70112  
Telephone: (504) 299-2100  
Facsimile: (504) 299-2300  
[jgarner@shergarner.com](mailto:jgarner@shergarner.com)  
[radams@shergarner.com](mailto:radams@shergarner.com)  
[mcoman@shergarner.com](mailto:mcoman@shergarner.com)

Kathleen A. DeLaney (#18604-49)  
**DELANEY & DELANEY LLC**  
3646 North Washington Blvd.  
Indianapolis, IN 46205  
Telephone: (317) 920-0400  
Facsimile: (317) 0404  
[Kathleen@delaneylaw.net](mailto:Kathleen@delaneylaw.net)

**COUNSEL FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 29th day of August, 2017, a copy of the foregoing was filed electronically. Notice of the filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

David J. Jurkiewicz  
Paul D. Vink  
BOSE MCKINNEY & EVANS, LLP  
111 Monument Circle  
Suite 2700  
Indianapolis, IN 46204

Jason S. McCarter  
Tracey K. Ledbetter  
EVERSHEDS SUTHERLAND (US) LLP  
999 Peachtree Street, NE, Suite 2300  
Atlanta, GA 30309-3996

/s/ Kerry A. Murphy  
Kerry A. Murphy